United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2003

To Be Argued By:
Martha S. Henley
Law Intern

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA, ex rel EZEKIAL CONWAY :

Petitioner-Appellant :

-against- :

LEON VINCENT, Superintendent, Green Haven Correctional Facility :

Respondent-Appellee :

- -x

B
P/S

DOCKET NO. 76-2003

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR PETITIONER-APPELLANT

+ Appendix

JAMES J. McDONOUGH
Attorney for Petitioner-Appellant
Attorney in Charge
Legal Aid Society of Nassau County
Criminal Division
400 County Seat Drive
Mineola, New York

OF COUNSEL:

MATTHEW MURASKIN
MARTHA S. HENLEY, Law Intern

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA, ex rel EZEKIAL CONWAY :

Petitioner-Appellant :

-against- : DOCKET NO. 76-2003

LEON VINCENT, Superintendent, Green Haven Correctional Facility :

Respondent-Appellee :

- -x

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR PETITIONER-APPELLANT

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (Honorable Henry Bramwell) filed on November 19, 1975, dismissing relator's petition for a writ of habeas corpus. The order and opinion are unreported and are reproduced in the Appendix at pages

A notice of appeal was timely served and filed and a certificate of probable cause was issued by Bramwell, J. on December 1, 1975.

In the District Court the petitioner-appellant proceeded in forma pauperis and was represented by James J. McDonough, Attorney in Charge, Legal Aid Society of Nassau County, New York, who is continuing to represent the petitioner-appellant in this Court.

PRIOR PROCEEDINGS

Appellant pled guilty in the State Court's of New York (Nassau County) to the crime of attempted possession of a weapon. On August 21, 1974, he was sentenced to a term of one and one-half to three years imprisonment.

Petitioner contends that it was constitutional error for the trial judge to rule that the gun found on his person was legally seized and, therefore, admissible in evidence.

Petitioner appealed to the Appellate Division, Second Department, who confirmed his conviction without opinion, 47 A.D.2d 1002 (1975). Leave to appeal to the New York Court of Appeals was denied by the Hon. Sol Wachtler on May 15, 1975. Having exhausted all of his state remedies, petitioner sought a Writ of Habeas Corpus in the United States District Court for the Eastern District before the Hon. Henry Bramwell, District Judge (United States of America ex rel Ezekial Conway v. Leon Vincent, Superintendent, Green Haven Correctional Facility, 75 C 1136).

A judgment dismissing the petition was filed on November 19, 1975. The court held that (1) the forcible "stop" was justified by the officers' exercise of his

investigatory function, and "[t]he right to frisk, therefore, followed." (Appendex p. A-11), and (2) the scope of the frisk was proper (Appendix p. A-12). A certificate of probable cause was issued on December 1, 1975 by Bramwell (U.S.D.J.).

ISSUES

Point One: THE SEARCH OF PETITIONER FOLLOWING THE MOTION OF HIS RIGHT HAND WENT BEYOND THE PERMISSABLE SCOPE OF A PROTECTIVE FRISK

Point Two: THE INITIAL STOP OF PETITIONER WAS NOT JUSTIFIED

TABLE OF CASES

STATEMENT OF FACTS

The facts of the instant case consist only of the testimony of Police Officer Robert Hill at a "Search and Seizure" hearing.

Officer Hill testified that on the night of February 18, 1974, he and two other officers, Sergeant Rubin and Officer Penna, were engaged in a licensed premises check, i.e., a check of local taverns to be sure the rules of the Alcoholic Beverage Control Commission were being obeyed (2-3).*

Officer Hill testified that at 8:00 P.M. on that evening, he heard a police radio notification of a drug store robbery in Freeport by a "male black, approximately 6'0" tall wearing a three quarter length brown or tannish colored coat... who was last seen walking towards Roosevelt" (4-5). The radio bulletin also mentioned a gun used in the robbery (5).

Shortly after 9:00 P.M., the officer entered the Corner Inn in Roosevelt (5, 28) about 1/2 mile from the location of the holdup (21). He was accompanied by Sergeant Rubin while Officer Penna remained in the car (5-6). Both officers were in uniform (35).

Officer Hill testified that inside the bar were an unspecified number of blacks (28). Immediately upon entering, he noticed a black male, approximately 6'0" wearing a three-quarter length brown jacket. The man was standing at the side of the room (6, 8). He appeared nervous and had his hands in his pockets (6, 29).

---

*Numbers in parenthesis refer to Minutes of Hearing.

The black male went to the back of the room. As the officer and Sergeant Rubin went to the back to check patrons, they passed this man who then turned around and left hurriedly (7, 9). This all took 3-4 minutes (8).

The male black walked out of the bar and started to walk away at a brisk pace (10). Officer Hill and Sergeant Rubin followed this individual out of the bar, and asked him to stop, which he did (10). The officer walked up to Petitioner and asked him his name, where he resided, where he had been shortly before, and how long he had been in the bar (10). Mr. Conway answered all of these questions (10-11). Officer Hill asked Mr. Conway for identification, but he was unable to produce any (12).

During this conversation Petitioner's hands were in his upper coat pockets. He was shuffling his feet and seemed to be nervous (11-12). Officer Hill noticed a bulge in Mr. Conway's lower right pocket (12) and attempted to pat it. Conway stepped back out of reach and asked Hill if he had a search warrant. As Conway stepped back he tried to ward off Hill's hands and made a movement with his right hand towards his left armpit (13, 15-17). Hill and Rubin grabbed his arms and placed or pushed him against a wall (17, 34). Hill then checked to see if the man "had anything on him." (18). He started at the left foot, checking the boot, and began to work up, patting the pants and then the overcoat (18).

Hill testified that he "...didn't know where [the man] was going when he reached to his left side, so [he] wanted to cover the whole area." (18). When he reached the lower chest area he felt a hard object in an inside pocket. Believing the object to be a gun, Hill held it with one hand while reaching inside with the other. He removed a gun from the inside pocket (20-21).

POINT ONE

THE SEARCH OF PETITIONER FOLLOWING THE MOTION OF HIS RIGHT HAND WENT BEYOND THE PERMISSIBLE SCOPE OF A PROTECTIVE FRISK.

It is settled that a frisk is a "limited" intrusion into the personal security protected by the Fourth Amendment. It is constitutional only if supported by a reasonable suspicion of criminal activity. The scope of a frisk is limited by its justification - the discovery of weapons which could be used to harm the police officer or others nearby. It is distinctly different from a full search, which can only be justified by probable cause, Terry v. Ohio, 392 U.S. 1 (1968), U.S. v. Gonzolez, 362 F.Supp. 415 (S.D.N.Y. 1973). In the case at bar, Mr. Conway contends the police went beyond the scope of a protective frisk and conducted an exploratory search in the absence of probable cause to arrest.

Officer Hill testified that after stopping petitioner and while questioning him he noticed a bulge in his lower right pocket. When the officer attempted to pat the bulge, petitioner pushed his hand away and asked if he had a search warrant. Simultaneously, Mr. Conway moved his right hand towards his left armpit. The officers then grabbed both arms, pushed him against a wall, and proceeded to search him by first checking his boots, then moving upward, patting his legs and then his torso (Minutes of Hearing, hereinafter referred to as M.H., 17-20).

Assuming arguendo that the initial stop of petitioner was based on reasonable suspicion and that the initiation of the frisk was justified, petitioner contends that the search went beyond its constitutionally permissible scope.

It has not been contended in this case that probable cause to arrest petitioner existed at the time of the stop and frisk (See opinion of Bramwell, J., Appendix p. A-14. An exploratory search was not, therefore, constitutionally permissible. The only possible justification for the search is under the stop and frisk rationale. A frisk is limited to the discovery of weapons as its sole justification is the protection of the police officer and others nearby. Terry v. Ohio, supra, at 37. Because such an intrusion is an exception to the requirement of probable cause, the Court held in Terry that its scope must be "'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Terry, supra, at 19. "It is a narrowly drawn authority..." Id. at 31.

The search of petitioner was "not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception -- the protection of the officer by disarming a potentially dangerous man." Sibron v. New York, 392 U.S. 40, 65 (1968). The officers did not, as in Terry, confine the search "strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons." Terry, supra, at 29-30. In fact, the search of petitioner more closely resembles a proper post-arrest search:

> [T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin

> and area about the testicles, and entire surface of the legs down to the feet. Terry, supra, p. 17.

Thus, petitioner contends that Officer Hill conducted an impermissible exploratory search of his person. Officer Hill testified to a bulge in Mr. Conway's right pocket and a gesture with his right hand toward his left armpit. Had the Officer properly limited intrusion to the area which was justified by the circumstances -- to what was "minimally necessary" to discover whether petitioner was armed -- he would have patted down the torso area. Instead, he began at petitioner's feet and "work[ed] [his] way up" (M.H., 18).

"[E]vidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." Id. at 29. See also U.S. v. Del Toro, 464 F.2d 526 (2d Cir., 1972). Thus, the failure of the trial court to suppress the gun as illegally seized evidence was a violation of petitioner's right to be immune from unreasonable searches and seizures.

POINT TWO

THE INITIAL STOP OF PETITIONER WAS NOT JUSTIFIED.

Petitioner contends that when police officers stopped him, their action was not based upon reasonable suspicion, that he had committed, was about to commit, or had committed a crime. The fruit of the subsequent frisk should, therefore, be suppressed.

A police officer may, as an investigatory measure, stop a person when he "...observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity is afoot." Terry v. Ohio, 392 U.S. 1, 30 (1968). A "stop" is a seizure within the perimeters of the Fourth Amendment and constitutes a "narrowly drawn" exception to the requirement of probable cause, Id. at 16, 27. Whether the officer's conduct in stopping a person is reasonable and, therefore, constitutional must be decided on a case by case basis, Id. at 29. The stop must appear reasonable upon an objective examination of the facts known to the officer at the time, Id. at 21-22, Adams v. Williams, 407 U.S. 143, 145-146 (1965).

The facts of the instant case are as follows. On the evening of February 18, 1974, Officer Hill and two other Nassau County police officers were checking taverns for ABC violations. At around 8:00 p.m. Officer Hill heard a police radio broadcast. The broadcast reported an armed robbery in

Freeport by a "male black, approximately 6'0" tall wearing a three quarter length brown or tannish colored coat...who was last seen walking towards Roosevelt." (M.H., 4-5). Approximately an hour later, he noticed petitioner in a bar in Roosevelt. Petitioner is a black man, and he was wearing a three quarter length brown jacket. Officer Hill testified that he watched petitioner for three to four minutes (M.H., 8). During that time he observed that petitioner seemed nervous. He "shuffled around a bit" and then went toward the rear of the room toward the pool table. As the officers passed him, petitioner turned around and walked out hurriedly (M.H., 7, 9). Officer Hill and another officer followed and observed petitioner walking at a brisk pace down the sidewalk.

Petitioner contends that his actions observed by police officers will not support a reasonable suspicion of criminal activity. Mere presence in a bar, a nervous appearance, and a brisk pace on a cold winter night do not in themselves indicate anything other than innocent activity. The only factor within Officer Hill's knowledge which could make him suspicious was the radio report.

Petitioner argues further that even with the radio bulletin, the officers did not possess sufficient "specific and articulable facts" to constitute a reasonable suspicion. The bulletin gave a very general description (a six foot

male black dressed in a three-quarter length brown coat), which could easily fit many citizens living in Roosevelt, a densely populated area inhabited mainly by blacks.

Even if the general description in the radio report is deemed sufficient to justify stopping a person fitting the description, petitioner contends that reliance on such a description uncorrobroated by any further indication that criminal activity is afoot should not be sufficient to justify a conviction where the initial seizure was based on a radio bulletin. The Supreme Court has held that when the greater intrusion of arrest is based on a radio report and the basis for the report is challenged by the defendant, the People must show that it was supported by probable cause, Whiteley v. Warden, 401 U.S. 560 (1971). The New York Court of Appeals has followed Whiteley in People v. Lypka, 36 N.Y. 2d 210(1975). Since a stop and frisk is also limited by the Fourth Amendment, Terry, supra, Petitioner argues that the People should have had to prove that the radio bulletin was supported at least by reasonalbe suspicion.

Furthermore, petitioner contends that the facts of his case indicate that the officers did not, in fact, suspect him to be the robber described in the radio bulletin and were not relying on the bulletin, the only fact within their knowledge which could support a reasonable suspicion.

The roport indicated a violent crime had been committed and further that the suspect was armed and dangerous (M.H.,

5). If the police had been concerned that petitioner was armed and dangerous, they would have frisked him without delay.

Compare the conduct of the officers in the case at bar with that of the officers in Terry. There the officer actually observed conduct which led him to suspect that a violent crime was about to be committed and that the men involved were armed. He approached them, identified himself, and asked their names. Receiving only "mumbles" in response, he immediately grabbed Terry and frisked him. Terry, supra, at 6-7. The New York Court of Appeals has allowed immediate frisks without prior questioning based on a reasonable suspicion where a violent crime with a weapon was involved. The rationale of these cases is that while suspicion of a nonviolent crime requires additional support for the belief that the suspect may be armed and dangerous before he may be frisked, such additional information is unnecessary when the suspected crime is one of violence because of the extreme and immediate danger to the officer. People v. Green, 35 N.Y.2d 193 (1974); People v. Mack, 26 N.Y.2d 311 (1970); People v. Taggart, 20 N.Y.2d 335 (1967); People v. Teems, 20 A.D.2d 803, apps., dismd; 14 N.Y.2d 943; 25 A.D.2d 496, affd.; 18 N.Y.2d 835.

In Mack, supra, patrolmen received a description of two burglary suspects. Fifteen minutes later they spotted

two men fitting the descriptions who were acting suspiciously. The officers ordered the suspects to stop and immediately frisked them. The court in justifying their action adopts the rationale of Justice Harlan on his concurrence to Terry:

> Where such a stop is reasonable...the right to frisk must be immediate and automatic if the stop is as here, an articulable suspicion of a crime of violence. Mack, supra. at 317.

In the case at bar the officers delayed in approaching petitioner. They first observed him inside the bar then followed him outside where they asked him to stop. First they merely questioned him. The questions went to his name, address, and whereabouts shortly before the encounter. No questions were even asked concerning his whereabouts at the time of the robbery - about an hour before.

Officer Hill testified that during the conversation he noticed a bulge in petitioner's pocket. When he reached out to pat it, petitioner stopped back, simultaneously requesting a search warrant and making a movement with his right hand towards his left armpit (M.H. 11-13).

Petitioner contends that an objective examination of the officers' conduct indicates that they did not, in fact, suspect him to be the robber described in the bulletin. Had they been relying on the radio report and thus suspecting petitioner to be the perpetrator of an armed robbery only an hour before, they would have taken more immediate measures to protect themselves. Instead, petitioner contends there was no reliance on the vague

description in the radio report, which could easily fit many people in Roosevelt, an area inhabited predominately by blacks. Petitioner argues that in the circumstances of his case a radio report cannot be used as an excuse for an otherwise illegal stop because that encounter uncovered a gun. The Supreme Court has clearly stated that the stop must be justified at its initiation. The evidence uncovered by an illegal search cannot be used to justify the initial stop. Sibron v. New York, 392 U.S. 40 (1968); U.S. v. Bynum, 360 F.Supp. 400 (S.D.N.Y., 1971).

Vague or unparticularized hunches are not sufficient to justify a stop. The officer must indicate specific and articulate facts sufficient to induce an ordinarily prudent and cautious man under the circumstances to believe criminal activity is afoot, Terry, supra, People v. Cantor, 36 N.Y.2d 106 (1975).

Since the initial intrusion was not constitutionally justified, the evidence produced by the subsequent search must be suppressed. Terry, supra; Cantor, supra.

CONCLUSION

FOR THE ABOVE STATED REASONS THE JUDGMENT SHOULD BE REVERSED.

Respectfully submitted,

JAMES J. McDONOUGH
Attorney for Defendant
Attorney in Charge
Legal Aid Society of
Nassau County, New York
Criminal Division
400 County Seat Drive
Mineola, New York

OF COUNSEL:

MATTHEW MURASKIN
MARTHA S. HENLEY, Law Intern

TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

All right. The court finds that on February 18, 1974, Police Officer Hill received a radio communication while operating a Nassau County Police vehicle. The Court finds as a fact that this radio communication was received by Police Officer Hill at about 8 p.m. on said day of February 18, 1974.

The Court finds that this radio communication referred to a robbery which occurred at a location in Freeport, within the confines of the First Precinct, and that the radio communication referred to the fact that the suspect was a male black, approximately six-feet tall, wearing a three-quarter length coat, and that the method of escape was not indicated, but that the suspect had apparently escaped on foot.

The Court finds further that the radio communication indicated that a black hand gun was used in the robbery.

The Court finds the fact that at about 9 p.m. of the same day, Police Officer Robert Hill, Sergeant Rubin and Police Officer Penna, in the course of normal police duties, entered a place of business at Nassau Road and Molyneaux Place, Roosevelt, New York, known as the Corner Inn.

The Court finds that upon entering that premises, Patrolman Hill noticed, within that premises, a male black, about six-feet tall, wearing a three-quarter length coat; that this male black appeared to be nervous, shuffled about, and that upon the entering into the bar of Police Officer Hill and other officers, that this male black went to the rear of the room.

The Court finds that about three or four minutes subsequent to this time, the male black then passed hurriedly past the officers and exited from the bar.

The Court finds as a fact that Police Officer Hill and Sergeant Rubin left the bar at this time, in order to follow the said individual. The Court finds that Police Officer Hill called to this individual to stop, and at about 10 feet from the premises the individual did so, and the police officers then approached that individual.

The Court finds that Police Officer Hill asked this individual his name, where he resided and where he had been. The Court finds that this individual replied that he resided at 297 Washington Avenue, Roosevelt, and said at that time he was with friends, at that time being the time of the occurrence of the robbery which had been the subject of a notification by the police communication.

The Court finds that the individual had his hands in his pockets, in his upper coat pocket, and he appeared to be nervous. The Court finds that Police Officer Hill noticed a large bulge in the pocket of this individual and that he attempted to pat it down.

The Court finds that the individual made a movement with his right hand to his left side, and at that point the police officers stopped him, put him up against the wall and were holding him.

The Court finds that this individual was thereupon searched by the police officers. The Court finds that Police

Officer Hill identified this individual in court as the defendant in this matter.

The Court concludes, as a matter of law --

The Court, therefore, concludes, as a matter of law, that Police Officer Hill had probable cause for stopping the defendant, Ezekiel Conway, and the Court concludes that, as a matter of law, the police officer had the right to conduct a pat-down search under the circumstances evident in this case;

And the Court indicates, as a reason for its determination that in the proper performance of police duties, police officers acting under circumstances such as occurred in this matter, would be perfectly justified in observing an individual who appeared to fit the description which came over an official police communication, who acted under circumstances indicating a nervous condition, a situation which would arouse the normal suspicion of police officers;

And viewed in the light of the information available to the officers, that a crime had occurred in an area only about a quarter of a mile from the area where this defendant was observed by the police officers it is the conclusion of this Court that the officers' actions were indeed proper, citing People v. Hoffman, 24 Appellate Division Second, 497, Second Department, 1965.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA ex rel. :
EZEKIEL CONWAY,
:
Petitioner,
:
-against- 75 C 1136
:
LEON VINCENT, Superintendent, MEMORANDUM
Green Haven Correctional Facility, : AND ORDER
:
Respondent.

- X

BRAMWELL, D. J.

This is an application for habeas corpus. Petitioner Conway was convicted in the Nassau County Court on July 19, 1974, after pleading guilty to attempted possession of a weapon. A sentence of 1-1/2 - 3 years imprisonment was imposed. The conviction was affirmed by the Appellate Division, Second Department on April 1, 1975, and the New York Court of Appeals denied leave to appeal. The exhaustion requirement of 28 U.S.C. §2254 has thus been satisfied.

Petitioner invokes federal habeas corpus relief on the ground that he was subjected to an allegedly unconstitutional search and seizure. The State trial Court had heard and denied a motion to suppress on July 19, 1974. The facts presented to that court, which petitioner asks

FPI—SS—3-11-72—30M—9153

this court to review, are as follows:

On February 18, 1974, three Nassau County police officers were making checks of licensed premises for violations of the Alcoholic Beverage Laws. At approximately 8:00 P.M., Officer Hill, one of the three investigators, received a radio transmission stating that a robbery had occurred at a nearby pharmacy. The suspect was described as "male black, approximately six-foot tall, wearing a three-quarter length brown or tannish colored coat." (Transcript of Suppression Hearing, Nassau County Court, July 10, 1974, at 4). The radio notification had further stated that the suspect had last been seen walking in a particular direction and that a "black-handled gun' had been used in the robbery. (Tr. at 5).

One hour later, Officer Hill and one of his colleagues entered a bar approximately one-half mile from the scene of the robbery. The testimony revealed that the officers immediately spotted a man who fit the description of the suspect, and who "seemed quite nervous." (Tr. at 6) Shortly thereafter, the suspect, the petitioner herein, turned and walked out of the bar "in a hurry." (Tr. at 7). Officer Hill followed the petitioner, and asked him to stop. When asked for identification, petitioner supplied his name and address, stating that he had been in the bar "for just

FPI—SS—3-17-72—30M—9153

a short while." (Tr. at 10-11). However, petitioner had no identification with him (Tr. at 12). Nor did he have any friends in the immediate area, a fact which "made [Officer Hill] more suspicious at that time." (Tr. at 11).

During the conversation, petitioner Conway had his hands in his "upper coat pockets", and appeared to be "shuffling" and "very nervous". (Tr. at 11). Hill noticed a bulge in Conway's lower pocket, and attempted to pat it. Conway asked Hill if he had a search warrant, stepping back at the same time to ward off Hill's pat-down. As he did so, Conway "made a movement with his right hand towards his left side," (Tr. at 13), "into the area of the pocket" (Tr. at 16). At that point, according to Hill's testimony, the other officer grabbed Conway's arm to stop him from reaching into his pocket, while Hill grabbed the other. Holding Conway's arms, the officers pushed the petitioner against a wall, and, starting with his feet, began a pat-down of Conway's outer garments. On the left side of the lower chest area, Hill "felt a hard object," and reached in to remove a loaded gun. (Tr. at 20). Hill then placed Conway under arrest.

Petitioner Conway asserts that the evidence (the revolver) used against him in the state proceeding was the product of an unconstitutional search. He argues that the

initial attempted pat-down of the "bulge" in the pocket was not jusitfied by the circumstances, and, further, that the subsequent frisk exceeded the permissible scope of a protective frisk authorized by Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968).

In Terry the Supreme Court set the standard which must be applied in cases such as this:

> We . . . hold . . . that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.
>
> Such a search is a reasonable search under the Fourth Amendment . . . .

392 U.S. at 30, 88 S.Ct. at 1884.

Petitioner argues that, given the Terry guidelines, Officer Hill was not justified in attempting to touch the bulge in petitioner's pocket since "there were no factors operating which would lead a reasonable man to believe he

he was facing an armed and dangerous individual." (Petitioner's Memorandum of Law in Support of the Writ, at 11). He asserts that the officer was relying on a "hunch", and that such is an inadequate basis for conducting even a partial search. (Id. at 12). Conway's reaction to the allegedly unlawful search, it is urged, was justified, and could not give rise to cause for a further search.

Petitioner further asserts, however, that even if "the initiation of the search was justified by the 'reaching' action by Mr. Conway" (Memorandum at 15), the scope of the search and the extent of the intrusion exceeded the bounds of the "carefully limited search" authorized by Terry. Conway's objections center upon the fact that the officer had commenced his search with a frisk of petitioner's feet - that "the fear of a weapon hidden in Petitioner's coat cannot be used to justify a total search of his body." (Memorandum at 18).

The Attorney General's office, as attorney for respondent, in its "Affidavit in Opposition", urges that "the case at bar is more of a Terry case than Terry itself." (at 6, #18). In Terry, the officer who had conducted the frisk of petitioner Terry and his companion had testified that "he was unable to say precisely what first drew his eye to them . . . 'in this case when I looked over they didn't look

right at me . . . .'" Terry v. Ohio, 392 U.S. at 5, 88 S.Ct. at 1871. Later, the officer "had become thoroughly suspicious. . . . he feared 'they may have a gun.'" 392 U.S. at 6, 88 S.Ct. at 1872. The Officer's fears remaining undispelled, he entered upon a course of what the Supreme Court determined to be, under the circumstances, fully justified by the public interest in "effective crime prevention and detection." 392 U.S. at 22, 88 S.Ct. at 1880.

> It was this legitimate investigative function [the] Officer . . . was discharging when he decided to approach [Terry] and his companions. He had observed [defendants] go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation.

Id. at 22, 88 S.Ct. at 1880-81. The Terry Court, acknowledging the "legitimate investigative function" which the Officer was fulfilling, noted that before a "stop" is justified, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion." Id. at 21, 88 S.Ct. at 1880 (footnote omitted).

> [I]n making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the

> search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?

Id. at 21-22, 88 S.Ct. at 1880 (citations omitted). Once the initial intrusion, or stop of the defendant is justified, it is incumbent upon the courts to recognize the legitimate need of the officer to exercise self-protective care in the pursuance of those duties which invite danger to his person.

> When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

Id. at 24, 88 S.Ct. at 1881.

With respect to the case at bar, this court is of the opinion that the initial "stop" of petitioner Conway was justified, under Terry standards. Officer Hill had heard a radio report stating that a robbery had occurred nearby. The suspect's description was given, and the direction of his escape was known. One hour later, Hill noticed petitioner, who fit the description of the suspect, within one-half mile from the scene of the crime. Conway's "suspicious behavior", along with the "specific and articulable" facts of the robbery known to Hill from the radio

FPI—SS—3-17-72—30M—9133

report, gave Hill reasonable grounds for an investigatory "stop".

Further, the report had stated that the perpetrator of the robbery had used a gun.[1/] The additional factor to which Officer Hill testified - the "bulge" in Conway's pocket - coupled with Hill's knowledge that a gun had been used by a person of the same description of petitioner, gave Hill "reasonable suspicion" to believe that the person whom he was investigating might be armed.

When Conway reacted to the officer's attempt to "pat" the bulge by reaching toward his left side (Tr. at 13), Officer Hill's fear for his personal safety was heightened. Clearly, it was reasonable on Hill's part to assure himself that he would not be injured.

> There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.

Terry v. Ohio, 392 U.S. at 33, 88 S.Ct. at 1886 (Harlan, J., concurring).

In the present case, the forcible "stop" was justified by Hill's legitimate exercise of his investigatory function. Under no view of the facts was it merely an act of harrassment. The right to frisk, therefore, followed.

If an intrusion is justified on less than probable cause, as it is under Terry standards, it must still be limited to its purpose, i.e., protection of the officer. In the Terry case,

> Officer McFadden patted down the outer clothing of petitioner . . . He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns . . . . He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.

392 U.S. at 29-30, 88 S.Ct. at 1884.

In the case at bar, Officer Hill frisked only the outer garments of petitioner, and did not intrude further until he felt a hard object which he believed to be a gun. (Tr. at 20-21). Hill had testified that he "didn't know where [Conway] was going when he reached to his left side . . .". (Tr. at 18). In short, he feared for his safety, and sought to relieve petitioner of any hidden dangerous weapons. The intrusion was limited to petitioner's outer garments until the hard object was found.

This court finds that the scope of the frisk was wholly consistent with the standrads set forth in Terry and in numerous cases which have interpreted the Terry decision. Cf., e.g. United States v. Del Toro, 464 F.2d 520 (2d Cir.

FPI—SS—3-17-72—30M—9153

1972).

Accordingly, this petition for habeas corpus must be and the same is denied in all respects.

SO ORDERED.

U. S. D. J.

Dated: Brooklyn, New York
November 17th, 1975

NOTE

1/ This court in no way implies that there existed at that time probable cause to arrest petitioner for the robbery, nor to conduct an exploratory search. The fact that Conway was not subsequently charged with that crime has no bearing upon the reasonableness of both the investigatory stop and the limited pat down search.

FPI—SE--3-17-72—30M—9153

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA, ex rel EZEKIAL CONWAY :

Petitioner-Appellant :

-against- :

LEON VINCENT, Superintendent, Green Haven Correctional Facility :

Respondent-Appellee

- -x

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

Donna M. Naegeli, being duly sworn deposes and says that she is a clerk in the office of James J. McDonough, Attorney in Charge, Legal Aid Society of Nassau County, N.Y., Criminal Division, attorney for the above named ~~petitioner~~ EZEKIAL CONWAY herein. That she is over 18 years of age, and resides at Mineola, New York. That she served the within, BRIEF FOR PETITIONER-APPELLANT on the 27th day of January, 19 76 upon

Louis Lefkowitz, Attorney General of the State of New York,
Two World Trade Center
New York, New York 10047

by depositing true copies of same securely enclosed in a post-paid wrapper in the Letter Box, maintained and exclusively controlled by the United States at 400 County Seat Drive, Mineola, New York.

Donna M. Naegeli

Sworn to before me this
27th day of January 1976

Lorraine C. Papas

LORRAINE C. PAPAS
Notary Public, State of New York
No. 30-4501796
Qualified in Nassau County
Certificate filed in Nassau County
Commission Expires March 30, 1977